United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL WITH PROOF OF SERVICE

77-7239

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

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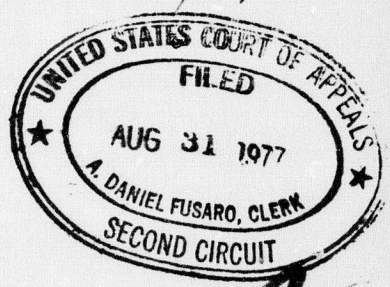

NATIONAL EQUIPMENT RENTAL LTD.,

~~Plaintiff~~-Appellant,

v.

H. WALTER HENDRIX III and JEAN K. HENDRIX,

Defendants-Appellees.

B P/S

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFF-APPELLANT

MARCUS, MALTINSKY & KATZ, P.C.
Attorneys for Plaintiff-Appellant
1501 Franklin Avenue
Mineola, New York 11501

On the Brief:

JONATHAN V. POLLACK
GERALD S. JACOBS
CHARLES JACOBSON

(6536B)

COUNSEL PRESS, INC., 55 West 42nd Street, New York, N.Y. 10036 • (212) 391-6622

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----------X

NATIONAL EQUIPMENT RENTAL, LTD.,

Plaintiff-Appellant,

-against-

H. WALTER HENDRIX, III and JEAN K. HENDRIX,

Defendants-Appellees.

----------X

Docket No. 77-7239

BRIEF FOR PLAINTIFF-APPELLANT

PRELIMINARY STATEMENT

This is an appeal from a judgment (App. p. 211)* rendered by the Hon. Jack B. Weinstein in the U. S. District Court for the Eastern District of New York, after a trial by jury, dismissing appellant's (hereinafter referred to as "NER") complaint on the basis of a special verdict by the jury finding the transactions to be a loan.

ISSUES PRESENTED

1. Was it reversible error to deny NER's motions to strike appellee's (hereinafter referred to as "Hendrix") jury demand?

2. Was the disposition sale of the equipment done in a commercially reasonable manner as a matter of law?

3. Are the transactions upon which this lawsuit is based subject to the laws of usury?

*(App. p.), signals reference to the appendix and the page; the second trial's transcript is included in the Appendix.

4. Was it the intention of both parties, NER and Hendrix, to enter into a usurious transaction?

5. Was it the intent of the legislature to include commercial transactions within the purview of the usury laws?

STATEMENT OF THE CASE

NER and Hendrix entered into two written agreements (App. pp.170,172) by which NER agreed to purchase certain equipment from third parties and lease it to Hendrix.

The action was brought by NER to recover damages for the breach of the two equipment leases by Hendrix, by reason of his default in making monthly rental payments thereunder. A cause of action is also stated for reasonable attorneys fees pursuant to the lease agreements, and a cause of action is stated against the appellee, Mrs. Jean K. Hendrix, based upon her written guarantee of the obligations of Hendrix.

The answer contains denials of the basic allegations of the complaint, and in addition, numerous affirmative defenses and counterclaims, many of which were withdrawn prior to trial, but including the affirmative defense of usury and the affirmative defense of the unreasonableness of the disposition sale by NER.

NER made a preliminary motion to strike Hendrix' jury demand prior to a trial of the action, which motion was denied.

The matter proceeded to trial, and at the end of the testimony, Hendrix' defense of usury was dismissed by Hon. Jack B. Weinstein (T. 1 p. 184).*

*(T. 1 p.) signals reference to the first trial's transcript and the page; the first trial's transcript is part of the Record only, Index No. 27,28,30.

The jury at that first trial rendered a special verdict that the sale was not commercially reasonable, and that if the sale were commercially reasonable, NER's disposition sale would have realized $103,500.00 net to NER to be credited to Hendrix, instead of $76,500.00 that was actually realized at the disposition sale.

Two alternative judgments were submitted on behalf of NER, one awarding judgment for the full amount of the deficiency, as demanded in the complaint, and the other awarding NER alternatively a lesser amount after crediting Hendrix with the full amount the jury held would have been realized at a commercially reasonable sale. Hendrix submitted a proposed judgment dismissing the complaint.

None of the judgments submitted were signed or entered, and a pre-trial order (R index no. 35)* was subsequently entered directing a second trial on the issue of usury.

NER moved again to strike Hendrix' jury demand as to the trial on the issue of usury, which motion was denied.

The matter proceeded to trial a second time on the issue of usury only, and the jury at the second trial rendered a special verdict that the transactions in question were loans.

A judgment dismissing the complaint based upon that special verdict, was signed and entered (App. p. 211).

STATEMENT OF FACTS RELEVANT TO THE ISSUES PRESENTED

As to the issues with respect to the motion to strike defendant's jury demand, paragraph "11" of each of the agreements

*(R index no.) signals reference to the record, other than the first trial's transcript.

between the parties (App. pp.171,173) states in pertinent part:

> Lessee hereby waives a trial by jury...in any litigation between the lessee and the lessor with respect to this lease, the property covered hereunder and the repossession thereof.

With respect to the commercial reasonableness of the disposition sale of the equipment, it should be noted that Hendrix was duly notified by NER of his default in making payments pursuant to agreement (T. 1 p. 31-32, 11. 23-25, 1); plaintiff peacefully repossessed the equipment through one, Joseph Whitehurst, who was authorized to act for plaintiff for that purpose, from the possession of Hendrix, and the equipment was voluntarily surrendered by Hendrix on or about November 15, 1974 (T.1 p. 32, 11. 7-14). The sale was a private sale made to Bush Evans Machinery Company in the amount of $85,000.00 (App. p. 192). Although the bill of sale was executed December 10, 1974 (App. p. 192), it was not released and the sale did not take place until December 16, 1974 (T.1 p. 38, 11. 4-6; p. 116, 11. 2-7; p. 124, 11. 3-4). The amount of the disposition sale ($85,000.00) represents 74% of plaintiff's original cost of the equipment, to wit: $115,000.00 (App. pp.195,196,203,209).

With respect to the issue of whether these transactions are loans subject to the laws of usury, it should be noted that NER purchased the equipment which is the subject of these transactions from third parties, and subsequently entered into and accepted the terms of the documents designated as "equipment leases" which are the subject of this action (App. pp.170,172). There is no testimony that anyone employed by NER was aware that

the amounts paid to the two vendors (third parties) represented the difference between the price of the equipment when new and the amount of money that Mr. Hendrix had already paid to the vendors, and in fact, Mr. Gerald S. Jacobs, NER's general counsel testified that he was completely unaware of that fact (T.1 p. 63).

ARGUMENT

POINT I

DENIAL OF NER'S MOTION TO STRIKE THE JURY DEMANDS OF HENDRIX WAS PREJUDICIAL AND REVERSIBLE ERROR.

The two leases signed by Hendrix contained the following provision at paragraph #11:

> Lessee hereby waives a trial by jury and the right to interpose any counterclaim or offset of any nature or description in any litigation between the lessee and lessor with respect to this lease, the property covered hereunder and the repossession thereof.

Hendrix requested a jury trial. (R. Index No.11). On June 25, 1975, the trial court denied NER's motion to strike the jury demand. At a second trial on the issue of usury NER again sought dismissal of the jury demand. That motion was denied on March 29, 1977.

The right to a jury trial is guaranteed by the Seventh Amendment to the United States Constitution. However, it is well settled that

> ...a jury trial lawfully may be waived both before and after a given cause of action shall arise. Rodenbur v. Kaufman, 320 F. 2d 679 (D.C. Cir. 1963). Also see Northwest Airlines, Inc. v. AirLine Pilots Ass'n., Int'l., 373 F. 2d 136 (8th Cir., 1967).

In Smith-Johnson Motor v. Hoffman Motors, 411 F. Supp. 670 (E.D. Va. 1975), a particularly well reasoned opinion, Chief Judge Kellam analogized the waiver of trial by jury clause to the Arbitration Act, 9 U.S.C. §2, which permits a contract provision providing for the resolution of disputes by arbitration. Additionally, Chief Judge Kellam found the reasoning of the Supreme Court in Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 12, (1972), upholding a contractual provision fixing the forum in which disputes could be litigated to be analogous to a jury waiver clause. Then quoting extensively from Bremen, supra at 676, Chief Judge Kellam selected the following language:

> There is strong evidence that the forum clause was a vital part of the agreement, and it would be unrealistic to think that the parties did not conduct their negotiations, including fixing the monetary terms, with the consequences of the forum clause figuring prominently in their calculations.

So, too, did the waiver of jury clause enter into the leases at bar.

The ability to waive a jury trial is also present in the law of New York. James Talcott, Inc., v. Wilson Hosiery Co., Inc., 32 A.D. 2d 524, 299 N.Y.S. 2d 460 (1st Dep't. 1969). Indeed, the validity of the provision at bar has been upheld in New York. In Nat'l. Equip. Rental, Ltd., v. Custom Machine Engineering Div. Chromalloy Div. of Okla., Index No. 11210/75, Sup. Ct. Nassau Co., Sp. Term Pt. I, Jan. 27, 1977, Hon. Raymond L. Wilkes said:

> The defendants maintain that the waiver provision is inconspicuous, extremely difficult to read due to the small print and is one of the several provisions which are distinctly in

favor of the plaintiff.

> The Court cannot accept the defendants' thrusts. The print, although small, is reasonably readable. The specific waiver clause is set off from surrounding provisions by lettering sufficiently darker to alert anyone reading the various provisions as to its existence....A claim that one is unaware of the provisions is insufficient to alter the waiver.

Also, see Nat'l. Equip. Rental, Ltd., v. Perry Sears, Indcx No. 18280/75, Sup. Ct. Nassau Co., Sp. Term Pt. I, Sept. 14, 1976, per Hon. James F. Niehoff. Copies of the last two cited cases are annexed hereto for the convenience of the Court.

The issues raised at the trial clearly come within the scope of the jury waiver provisions. The refusal of the trial court to give the waiver its intended effect worked a substantial prejudice on NER. In fact, counsel for Hendrix seized upon the opportunity to point out the large corporate structure of NER to the jury at (T.1 pp. 18, 38-40). Although the trial judge admonished the jury (T. 1 pp. 18 and 40) the imposing conglomerate image of NER never was erased. The reality of that prejudice is the exact reason for the existence of the instant jury waiver clause. The trial court's disregard of that portion of the contract deprived NER of a fair trial and constituted reversible error.

POINT II

THE DISPOSITION OF THE EQUIPMENT WAS "COMMERCIALLY REASONABLE" AS A MATTER OF LAW.

The first trial concerned itself with the question of the commercial reasonableness of the disposition of the leased equip-

ment. The parties had stipulated to the following facts.

> Plaintiff peacefully repossessed said equipment through one, Joseph Whitehurst, who was authorized to act for plaintiff for that purpose on or about November 15, 1974, from the possession of Defendant, Hendrix, in South Carolina, which said equipment was voluntarily surrendered by said Defendant, Hendrix, on or about that date.
>
> A certified letter of plaintiff was addressed to the defendants dated December 5, 1974, was received by defendants prior to December 16, 1974.

That letter was accepted into evidence as NER's Exhibit 6. (App. p. 181). In evidence as Hendrix' Exhibit D was a bill of sale for the leased equipment. (App. p. 192). The bill of sale is dated December 10, 1974. Mr. Gerald S. Jacobs testified that he signed the bill of sale on behalf of NER and gave it to an employee of NER with instructions not to release it until after the sale day, December 16th. (T. 1 pp. 18-20).

Also in evidence as Hendrix' Exhibit K was NER's check in the sum of $31,161.62 payable to Western Carolina Tractor, representing the cost to NER of the equipment subject to Schedule A. (App. p. 202A). Hendrix' Exhibit O was a NER check in the sum of $84,442.74 payable to Jeff Hunt Machinery Corporation, representing the cost to NER of the equipment subject to Schedule B. (App. p. 210).

In evidence as Hendrix' Exhibit H was a check from the purchaser of the equipment made payable to NER in the sum of $85,000.00 representing the gross proceeds on the sale of the equipment subject to the two leases. (App. p. 196).

The N.Y. Uniform Commercial Code, §§9-504 and 9-507

(McKinney 1964), (hereinafter "U.C.C."), in pertinent part, provides:

> §9-504 Secured Party's Right to Dispose of Collateral After Default; Effect of Disposition
>
> (1) A secured party after default may sell... any or all of the collateral...following any commercially reasonable preparation or processing.
>
> (3) Disposition of the collateral may be by public or private proceedings...Sale or other disposition may be as a unit or in parcels and at any time and place and on any terms but every aspect of the disposition including the method, manner, time, place and terms must be commercially reasonable.
>
> §9-507 Secured Party's Liability for Failure to Comply with This Part
>
> (2) The fact that a better price could have been obtained by a sale at a different time or in a different method from that selected by the secured party is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner. If the secured party either sells the collateral in the usual manner in any recognized market therefor or if he sells at the price current in such market at the time of his sale or if he has otherwise sold in conformity with reasonable commercial practices among dealers in the type of property sold he has sold in a commercially reasonable manner.

The jury was presented with evidence by defendants' witness, Mr. Leon Williams, that in November of 1974, he advised NER's repossessor that he would have paid $115,000.00 for the leased equipment. (T. 1 p. 143).

On December 16, 1974, Mr. Hendrix showed up at Mr. Williams' establishment, Jeff Hunt Machinery Co., and told him there was to be a private sale of the equipment that morning. However, Mr. Williams just sat there with Mr. Hendrix, who knew

NER's telephone number, and Mr. Williams made no effort to contact NER for the purpose of bidding on the equipment. (T.1 pp. 149-150).

NER had adduced expert testimony from Mr. Harold Horowitz, that the price for which this equipment was sold, $85,000.00, was a fair and reasonable price. (T.1 p. 98).

Nevertheless, the jury returned a special verdict finding that the sale was not commercially reasonable. The jury found that had the sale been conducted in a commercially reasonable manner the net price would have been $103,500.00 (obviously based upon a gross price of $115,000.00 less 10% commission).

There is no dispute that Hendrix received the certified notice of sale letter dated December 5, 1974, from NER prior to the date of the sale. That letter, in pertinent part, provided:

> ...we will sell at private sale to be held at 10:30 A.M. on the 16th day of December, 1974 the following equipment (listing the equipment). The sale will be held at the premises of Jeff Hunt Machinery Co. Charleston Highway, Columbia, South Carolina.

In Associates Discount Corp. v. Forcier, 5 U.C.C. Rpt. Serv. 294, N.Y.L.J. April 8, 1968, p. 26 (Sup. Ct. Suffolk Co.) per Mr. Justice Stanislaw, (a copy of the case is annexed), plaintiff was granted summary judgment in an action for a deficiency under a retail installment contract where the November 23rd notice of sale, which had actually been received by the defendant, provided that there would be a private sale "...after 5:00 P.M. on December 2, 1966 and from day to day thereafter until sold..." Here Hendrix received a notice which more than met the standards set forth in Forcier. Hendrix should not now be heard to com-

plain about an inadequately low purchase price after receipt of the notice of sale. The reasonableness of the "price" was the only aspect of the sale which the jury found to be commercially unreasonable.

The fact that Mr. Williams expressed a willingness in November of 1974 to purchase for $30,000.00 more than the actual sale price in December, 1974 merely showed that a "better price" could have been obtained at a different time. To allow the special verdict to stand flies in the face of U.C.C. §9-507 (2).

In In re Zsa Zsa Ltd., 352 F. Supp. a sale of the inventory of a cosmetics manufacturer brought in less than ten cents on the dollar on the alleged retail value of the inventory. That sale was held to be commercially reasonable.

In Zsa Zsa, supra at 671 the court said:

> The language of §9-507 reveals that the primary focus of commercial reasonableness is not the proceeds received from the sale but rather the procedures employed for the sale. If the secured creditor makes certain that conditions of the sale, in terms of the aggregate effect of the manner, method, time, place and terms employed conform to commercially accepted standards, he should be shielded from the sanctions in Article 9. (emphasis in the original).

There was absolutely no evidence of any self dealing between NER and the purchaser of the equipment. This writer is unable to find any case law in either New York or a sister state where after proper notice of a private sale has been given and a good faith disposition of 74% of the original sales price has been obtained that the sale was found to be commercially unreasonable.

The instant sale was commercially reasonable as a matter of law.

POINT III

THE LAWS OF USURY ARE NOT APPLICABLE TO THE TRANSACTIONS AT BAR

The documents in question (App. p.170,172) appear on their face to be leases of equipment. Concededly, Hendrix was given options to purchase the equipment at the end of the term of the lease for specific amounts. While the courts of New York State have held some such equipment leases with options to purchase to be conditional sales contracts rather than leases, the New York law is clear and consistent in holding that the laws of usury do not apply in any case to such transactions. Congress Financial Corp. v. Patti, 26 A.D. 2d 924, 274 N.Y.S. 2d 711 (1st Dep't. 1966); Morris Plain Indus. Bank of Schnectady v. Faulds, 269 A.D. 238, 55 N.Y.S. 2d 372 (3rd Dep't. 1945); People v. Guttin, 266 A.D. 1023, 44 N.Y.S. 2d 821 (2d Dep't. 1943); Aglio v. Carousel, Inc., 34 Misc. 2d 79, 228 N.Y.S. 2d 350 (Sup. Ct. King Co. 1962); Thomas v. Knickerbocker Operating Co., 108 N.Y.S. 2d 234 (Sup. Ct., N.Y. Co. 1951).

Moreover, it has been consistently held that usury is not a defense against the enforcement of a purchase money mortgage. Mandelino v. Fribourg, 23 N.Y. 2d 145, 245 N.E. 2d 823, 295 N.Y.S. 2d 654 (1968); Bennis v. Thomas, 14 A.D. 2d, 895, 221 N.Y.S. 2d 350 (2d Dep't. 1961).

The case of McGalliard v. Liberty Leasing Co. of Alaska, Inc., 534 P. 2d. 528, (1975), cited by Defendants at trial as involving a similar transaction which was held to be a usurious loan, can be distinguished and, in fact, the Alaska Supreme Court points

out the distinction. The Court stated that at the time of the transactions there in question, Alaska, Iowa and the Virgin Islands were the only United States jurisdictions in which the usury laws included the word "sale", and that although the Alaska statute was adopted from an early Oregon code, which was subsequently amended, the Alaska legislature did not so amend the Alaska statutes and the usury laws in that State continue to apply to "sales". McGalliard, supra, at 533. Such is not the case in New York. Even in light of that distinction, the dissenting opinion of Justice Boochever delves at some length into the policy arguments for a narrow construction of the usury statutes.

Nat'l. Equip. Rental, Ltd. v. Stanley, 283 F. 2d 600 (2d Cir. 1960), on which defendant relies, dealt with a sale and leaseback transaction, in which title to the equipment was originally in the debtor, sold to the creditor, and leased back to the debtor, a situation where the intention of a loan may more likely be inferred.

In the case of Burr v. Capital Reserve Corp., 80 Cal. Rptr. 345, 458 P. 2d 185 (1969), the highest Court of California found that two of the three transactions involved did not constitute a loan of money. Crucial to the Court's analysis was the fact that the lessee

> "...desired to obtain from [the lessor] not money but the use of property which he did not have funds to purchase." (458 P. 2d at pp. 192-193).

The third transaction involved a sale and leaseback arrangement in which the Court found that the primary intention

of the parties was a loan transaction. In the case at bar, there is no question that defendant Hendrix' primary requirement was the use of the construction equipment to continue making his livelihood. There was no demonstration at trial that NER and the vendors had any regular business relationship which would convert this transaction into a usurious loan. NER was not shown to have any knowledge of the alleged equity interest which Hendrix claims to have held in the equipment prior to his entering into the lease with NER.

In fact, Mr. Jacobs testified on cross-examination that he was unaware that the amounts paid to the two vendors represented the difference between the price of the equipment when new and the amount of money that Mr. Hendrix had already paid to the vendors. (T. 1 p. 63) Those questions as asked to Mr. Jacobs on cross-examination presupposed a fact which was not in evidence and was admitted over objection of counsel. There is, in fact, no evidence at all that the prices paid by NER were the balances due from defendant to the two vendors, nor is there any evidence that anybody connected with NER had any knowledge that a prior agreement existed between Hendrix and the two vendors. The very fact that NER gave Hendrix an option to purchase evidences NER's belief that it was the sole owner of the equipment and had full title thereto by purchase from the two vendors. To hold otherwise would place Hendrix and the two vendors in a position to conspire to defraud NER; for if the vendors did not have title to the equipment they sold to NER, Hendrix could then take advantage of his own fraudulent intent.

POINT IV

BOTH PARTIES TO A TRANSACTION MUST INTEND IT TO BE USURIOUS.

The mere contention by one party that the transaction was intended to be usurious, is insufficient to establish the intent of both parties.

> "The full intention to take usury, must have been in full contemplation of the parties not of one but of both to the transaction (cases cited)". Cohen v. Beaudry, 100 N.Y.S. 2d 519, 525. Emphasis supplied.

In reviewing and studying the facts in this case we are faced with the following:

> A: NER purchased the goods directly from the vendors and not from Hendrix. (T. 1 pp. 41-42; App. pp. 183, 184)
>
> B: All proceeds from the payment went directly to the vendors and Hendrix did not receive any of the proceeds. (T. 1 pp. 40-41; App. pp. 202A, 210)
>
> C: Hendrix, in his answer to the complaint stated the transaction was a conditional sale (App. p. 11) and not a loan.
>
> D: Hendrix was friendly with and knew the parties who brought this transaction about (T. 1 pp. 136-137, 175, 178; App. p. 58-59)
>
> E: Hendrix paid a tax on his payments to NER. (T. 1 pp. 46, 64; App. p. 42)

From the foregoing it is quite evident that at least NER had no intention to make a loan to Hendrix, but in fact it intended to purchase the equipment from independent parties and lease it to Hendrix. The idea of a "loan" was created by Hendrix at the time of trial, in order for him to recoup the benefit of his contrived actions with parties who were well known to him.

In Cohen v. Beaudry, supra 526, the Court held,

> "...It is undoubtedly the rule that the [defendant] must also show that the act of the agent was authorized by the principal, or that he took the bonus with the lender's knowledge and assent so that the latter, at least by acquiescence, became a party to the usurious transaction."

The testimony and evidence clearly shows that NER had no knowledge of Hendrix' interest in the equipment or that he had ever made any payments to any other party to obtain an equity interest in the equipment. The invoices from the two (2) vendors to NER never showed any credit for Hendrix nor did it reflect that the purchase price paid by NER was less than its present value.

The vendors and the broker, Mr. Kelly, were all known to Hendrix for a substantial period of time (T. 1 pp. 136,175,178). Hendrix testified that he knew Mr. Kelly and that he knew Mr. Kelly was not an employee of NER (T. 1 pp.177-178).

These facts clearly show that NER did not have the necessary knowledge to form an intent to commit usury. It would appear that all of the relevant facts were known to Hendrix who in concert with these parties was able to delude NER into believing that the transaction was something other than that intended by NER.

> "The presumption is against taking of usury. A usurious agreement will not be presumed from facts equally consistent with a lawful purpose. Grannis v. Stevens, 216 N.Y. 583, 111 N.E. 263; White v. Benjamin, 138 N.Y. 623, 33 N.E. 1037" Leibovici v. Rawicki, 1968, 57 Misc. 2d 141, 290 N.Y.S. 2d 997, aff'd., 64 Misc. 2d. 858, 316 N.Y.S. 2d 181.

From all of the facts it could readily be presumed that the transaction was consistent with a lawful purpose, namely, the purchase of the equipment by NER for lease to Hendrix without any intention to make a loan or other contract which would by its terms become a void contract.

POINT V

THE PRIMARY INTENT OF THE LEGISLATURE IN THE ENACTMENT OF THE USURY LAWS IS THE PROTECTION OF THE CONSUMER, OR NON-BUSINESS BORROWER.

It is always the duty of the Court to ascertain the intent and purpose of the legislature in the construction of the usury statutes 91 C.J.S. Usury, §8, p. 572.

Even if the transactions in this case were to be considered loans as opposed to purchase money mortgage or conditional sale transactions, the Court should inquire as to whether the legislature intended this particular type of "loan" to fit within the purview of the protection of the usury statutes.

The difficulty that the Courts have traditionally had in construction of the usury laws is illustrated by the following:

> "Usury is not illegal at common law, but is made so by statute in most of the United States as to some or all kinds of loans....The words of the statutes are general and the decisions of the Courts are largely based not on interpretation of specific words but on doctrines developed by the courts in regard to usury which form in a sense a kind of common law in regard to the subject, and this is true even when courts differ in regard to what the common law is". Restatement (Second) of Contracts, Introductory Note §526 (1936).

That the intent of the legislature in enacting the laws governing usury in New York is primarily the protection of the needy consumer, or non-business borrower, has been stated by the courts:

> "Born of avarice it (usury) feeds upon the necessitous individual whose protection is proclaimed by statute, witness the provision that excludes corporations from the law's guarding shield". Failing v. National Bd. Investment Corp., 168 Misc. 617, 6 N.Y.S. 2d. 67 (City Ct. Rochester, (1938).
>
> "Usury laws are for the protection of the borrower because the power of the lender to relieve the borrower's needs creates the opportunity for oppression." Malmud v. Blackman, 251 A.D. 192, 295 N.Y.S. 398 (2d Dep't. 1937), aff'd., 278 N.Y. 658, 16 N.E. 2d 391.
>
> "The ostensible object of the statute is to protect the weak, the needy, and the unwary from the rapacity of the avaricious. Universal Credit Co. v. Lowell, 166 Misc. 15, 2 N.Y.S. 2d 743 (City Ct. Rochester 1938).

This intent is further evident from the provisions making the defense of usury unavailable to corporations in general, and inapplicable to loans of over $250,000.00.

The New York statutory provisions placing the defense of usury outside the reach of corporate entities (now §5-521 (1) N.Y. Gen'l. Obl. Laws, dates backs to 1850 (L. 1850 c. 172, §§1,2). It states, in the negative, that "no corporation shall hereafter interpose the defense of usury in any action." It is not a provision of exclusivity and cannot and should not be interpreted in the converse; that is, that under all circumstances, all persons or entities other than corporations may interpose a defense of usury. That provision was enacted in an era when corporations existed almost exclusively for business purposes, and

it was that business purpose which was logically deemed not needful of the usury defense. Indeed, in 1957, General Business Law Section 374 was amended by adding what is now subdivision 2 of §5-521 N.Y. Gen'l. Obl. Law giving corporations whose principal asset is a one or two family dwelling (that is, non-business purpose corporations) the protection of the usury laws.

General Obligations Law §5-501 (6) enacted in 1974, provided that the usury prohibitions will not apply to any loan or forebearance in the amount of $250,000.00 or more.

Again, it should be noted that this statutory exception is also stated in the negative:

> "No law regulating the maximum rate of interest.... shall apply to any loan or forebearance in the amount of Two Hundred Fifty Thousand Dollars or more...." N.Y. General Obligations Law §5-501 (6).

This negative expression of the exception to the usury laws does not necessarily bring every loan of less than $250,000.00 within the ambit of the usury laws.

The New York City Bar Association Memorandum explaining the purpose of that amendment states:

> "This bill would extend the treatment presently accorded to corporations to others, including...individuals, whose borrowings are over $250,000.00, a magnitude which would indicate that the borrowing is for business purposes or that the borrower is not a realistic object of concern of the usury laws....
>
> In continuing the application of the usury laws to loans of less than $250,000.00...the bill would have no affect on the ordinary consumer who would continue to be protected under existing law. 1974 N.Y.S. Legislative Manual, p. 94.

The Courts of New York State have increasingly, in recent years, distinguished between business and non-business purpose of loans as the basic criteria of the usurious nature of a loan.

> "The defense of usury is not available to the one who promotes the advances for the purpose of employing the money in a business venture...." Leibovici v. Rawicki, 57 Misc. 2d 141, 29 N.Y.S. 2d 997 (Civ. Ct. N.Y.C. 1968).

More recently, the Court of Appeals of New York State although considering the use of the corporate form to conceal an alleged usurious loan to an individual guarantor, focused on the business versus non-business purpose of the loan as the real test of the availability of the defense of usury:

> "Where an individual borrows money through a shell corporation to further his own business or commercial enterprise, the defense of usury is not available." Schneider v. Phelps, 41 N.Y. 2d 238, 391 N.Y.S. 2d 568, 571 (1977).

That Court, in reversing the grant of summary judgment, further stated as follows:

> "...it will be pertinent at the trial, to show the understanding of the parties with respect to the purpose of the loan and the uses to which the proceeds were to be put-whether to pay personal obligations of the individual or to finance a profit-motivated enterprise. In this connection, the purpose of each of the series of loans should be explored to ascertain whether any or all of the loans were intended to further a profit-making enterprise...."
>
> "It will also be material to establish the expected source of funds for repayment of the indebtedness; whether from the anticipated profits or from personal resources of the individual....it should be obvious that the precise legal form of the loan will not be determinative of the ultimate question of fact-whether

> the loan was made to the individual for personal purposes or in furtherance of a profit-making corporate or personal enterprise." Schneider v. Phelps, 391 N.Y.S. 2d 568 at 572.

In the case at bar, there can be no question that defendant's purpose in entering into these transactions was the business purpose of retaining the use of the equipment for his construction business (App. p. 78).

If plaintiff had required that defendant form a corporation, there is no question that the defense of usury would not have been available to defendant Hendrix. Schneider, supra and Leader v. Dinkler Mgt. Corp., 20 N.Y. 2d 393, 283 N.Y.S. 2d 281, 234 N.E. 2d 124, (1967).

To enable defendant Hendrix in this case to utilize the usury laws of New York as a defense to plaintiff's action, and a bar to plaintiff's recovery would merely serve to punish the plaintiff because it did not seek to purposefully avoid the laws of New York by conditioning the transaction on the defendant's formation of a shell or "dummy" corporation; an illogical and inequitable consequence.

CONCLUSION

It was error for the trial court to deny NER's motion to strike the jury demand. On this issue the judgment against NER should be reversed. However, as seen from the facts and the law set forth herein on the issue of a loan, usury and commercial reasonableness, the court must reverse the judgment against NER and grant judgment to NER on its complaint.

Respectfully submitted,

MARCUS, MALTINSKY & KATZ, P.C.
Attorneys for Plaintiff-Appellant,
1501 Franklin Avenue
Mineola, New York 11501

On the Brief:

JONATHAN V. POLLACK
GERALD S. JACOBS
CHARLES JACOBSON

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss .

VINCENT PANZA, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 2002 Ellis Ave Bronx. N.Y.

That on the 31 day of AUGUST, 1977, deponent personally served the within BRIEF FOR PLAINTIFF-APPELLANT upon the attorneys designated below who represent the indicated parties in this action and at the addresses below stated which are those that have been designated by said attorneys for that purpose.

By leaving 2 true copies of same with a duly authorized person at their designated office.

~~By depositing _____ true copies of same enclosed in a postpaid properly addressed wrapper, in the post office or official depository under the exclusive care and custody of the United States post office department within the State of New York.~~

Names of attorneys served, together with the names of the clients represented and the attorneys' designated addresses.

STANLEY S. ARKIN
Attorney for Defendants-Appellees
300 Madison Avenue
New York, New York 10017

Vincent Panza

Sworn to before me this
31 day of August, 1977

Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930908
Qualified in Queens County
Commission Expires March 30, 1979

SHORT FORM ORDER

SUPREME COURT – STATE OF NEW YORK

Present: HON. RAYMOND L. WILKES
Justice.

TRIAL/SPECIAL TERM, PART 1
XXX NASSAU COUNTY

NATIONAL EQUIPMENT RENTAL LTD.,

Plaintiff,

– against –

CUSTOM MACHINE ENGINEERING DIVISION
CHROMALLOY DIVISION OF OKLAHOMA, etc.,
et als,

Defendants.

INDEX NUMBER 11210, 1975

MOTION DATE Dec 30, 1976

MOTION CAL. NUMBER 36

TRIAL CAL. NUMBER

The following papers numbered 1 to 11 read on this motion to strike from calendar

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause	1 - 7
Answering Affidavits	8 - 10
Replying Affidavits	
Pleadings – Exhibits – Stipulation	

Briefs: Plaintiff's/Petitioner's ..... Defendant's/Respondent's 11

Upon the foregoing papers it is ordered that this motion by the plaintiff to strike this action from the jury calendar is granted.

The defendants entered into a written equipment leasing agreement with the plaintiff, on the back of which is a provision stating that the lessee waives a trial by jury aswell as the right to interpose any counterclaim or offset in any litigation between them. The defendants maintain that the waiver provision is inconspicuous, extremely difficult to read due to the small print and is one of the several provisions which are distinctly in favor of the plaintiff.

The Court cannot accept the defendants' thrusts. The print, although small, is reasonably readable. The specific waiver clause is set off from surrounding provisions by lettering sufficiently darker to alert anyone reading the various provisions as to its existence. In addition, the defendants are not the kind of tenants or consumers who are most commonly involved in cases dealing with jury trial waiver (see Arol Development Corp. v. Goodie Brand Packing Corp., 83 Misc. 2d 477 and the cases cited therein.) The parties herein are corporations and corporate officers with a presumptive degree of business acumen. It should be noted as well that the lease gives notice on its face to the lessee of conditions contained on the reverse side thereof which are a part of the entire agreement. A claim that one is unaware of the provisions is insufficient to alter the waiver. (James Talcott Inc. v. Wilson Hosiery Co., 32 AD 2d 524). These defendants are accountable to and responsible for the provisions of their executed agreement, absent other legally compelling reasons.

Dated 1/27/77

R. L. Wilkes
J.S.C.

ECN 8
M-759 15M/3/76

SHORT FORM ORDER

(JPREME COURT – STATE OF NEW [illegible]K

Present: HON. JAMES F. NIEHOFF Justice.

TRIAL/SPECIAL TERM, PART 1
NASSAU COUNTY

2

NATIONAL EQUIPMENT RENTAL, LTD.,

Plaintiff,

– against –

PERRY SEARS, ROBERT CLARK, d/b/a AAMCO TRANSMISSIONS,

Defendants.

INDEX NUMBER 18280, 19 75

MOTION DATE September 3, 19 76

MOTION CAL. NUMBER 49

TRIAL CAL. NUMBER

The following papers numbered 1 to 8 read on this motion by plaintiff to strike this action from the jury calendar

	PAPERS NUMBERED
Notice of Motion/~~Order to Show Cause~~	1 - 3
Answering Affidavits	4 - 5
Replying Affidavits	6 - 8
Pleadings – Exhibits – Stipulation	
Briefs: Plaintiff's/Petitioner's ..... Defendant's/Respondent's	

Upon the foregoing papers it is ordered that this motion by plaintiff to strike this action from the jury calendar is granted inasmuch as said defendants waived their rights to a jury trial by the terms of Paragraph 11 of the contract entered into by them. Such a jury waiver has been held to be enforceable (See, e.g. James Talcott, Inc. v. Wilson Hosiery Co., 32 AD 2d 524).

Dated Sept 14 1976

J.S.C.

SCN 8 15M/3/76

fendant concerns an alleged failure on the part of the seller to perform its contractual obligations. That defense may not be asserted against the plaintiff (Uniform Commercial Code, § 9–206).

. . . . . .

ASSOCIATES DISCOUNT CORP. v. FORCIER

New York Supreme Court, Suffolk County
New York Law Journal, April 8, 1968, p 26

[¶ 9504] Reasonable notification of time of private sale of collateral.
Notice to debtor dated November 23, 1966, stating that automobile which had been repossessed after default would be offered for private sale by the creditor "after 5 P.M. on December 2, 1966 and from day to day thereafter until sold" complied with the requirements of UCC § 9–504(3).

UCC Section Cited: § 9–504(3).

STANISLAW, J. Plaintiff moves for summary judgment in an action for a deficiency under a retail installment contract, for the purchase and sale of an automobile. Defendant opposes the motion and cross moves for judgment in his favor on the ground that after repossession, the vehicle was sold at a private sale without notice to defendant of the time and place of the sale.

There is no dispute as to the terms of the agreement or defendant's default. It is further agreed that a written notice of sale, dated November 23, 1966, was received by defendant, which notice described the vehicle, stated that it would be offered for private sale by defendant "after 5 P.M. on December 2, 1966 and from day to day thereafter until sold"; that plaintiff may redeem the property at any time before it is sold; and that if sufficient money is not realized from the sale to satisfy the amount due, plaintiff will be held liable for the deficiency.

The opposing affidavit, submitted by defendant's counsel, refers to § 9–504(3) of the Uniform Commercial Code, which provides that reasonable notification of the time and place of the sale must be provided to the debtor, otherwise the sale is void and the buyer is released of further obligation to the seller.

The section, however, provides that the disposition of the collateral, covered by a security agreement, may be made by public or private sale. Notice of time and place is required only for a public sale. But in the event of a private sale, all that is required is "reasonable notification of the time after which any [such] sale or other intended dis-

position is to be made. . . ." Thus, the subject notice, dated November 23, 1966, fully complies with the applicable statutory requirements.

Since there is no other issue of law raised in the pleadings or affidavits, and there are no triable issues of fact in dispute, plaintiff's motion for summary judgment against defendant is granted.

Settle order.

OPINION OF THE ATTORNEY GENERAL OF ALABAMA

March 8, 1968

[¶ 9402] Amendment of financing statement—information required.

Amendments to a financing statement must contain the same information as an original financing statement. When an amendment to a financing statement is filed either to add new security or to indicate additional indebtedness, the amendment must meet the minimum legal requirements of UCC § 9–402.

[¶ 9402] Amendment indicating new or additional indebtedness.

Since an amendment to a financing statement describing new and/or additional collateral and indicating new and/or additional indebtedness is subject to the Alabama mortgage tax, it is incumbent upon the party seeking to file such an amendment to indicate the amount of the new or additional indebtedness so that the filing officer can determine the amount of tax due.

[¶ 9402, ¶ 9403] Amendment not signed by secured party.

The filing officer should not accept for filing an amendment to a financing statement which is not signed by the secured party and which does not indicate the amount of new or additional indebtedness but should return it to the party presenting it for filing for correction.

UCC Section Cited: § 9–402(4).

To: Hon. Winford B. Smith, Judge of Probate, DeKalb County, Fort Payne, Ala.

MACDONALD GALLION, Attorney General. I have your letter of February 27, 1968, which is as follows:

> "I would like to inquire about a problem which has come up in our office regarding the Uniform Commercial Code. It appears that some lenders when they make a new loan are filing an amendment (Form UCC–3) showing a new vehicle on an old mortgage, instead of filing a new UCC–1 form. Our question is whether we should accept these for recording and, if so, what to do about charging mortgage tax. We are given no information at the time of any of these filings as to the amount of the new loan. Copies of a financing statement and an amendment of the type we are referring to are enclosed."